

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

IN THE MATTER OF:

LEVIATHAN MINE  
ALPINE COUNTY, CALIFORNIA

ARCO ENVIRONMENTAL  
REMEDICATION, L.L.C.  
Respondent

MODIFICATION OF THE 1998  
ADMINISTRATIVE ORDER ON  
CONSENT FOR REMOVAL ACTION

U.S. EPA Region IX  
CERCLA  
Docket No. 1998-07A

Proceeding Under Sections 104, 106(a), 107  
and 122 of the Comprehensive Environmental  
Response, Compensation, and Liability Act, as  
amended, 42 U.S.C. §§ 9604, 9606(a), 9607  
and 9622

**I. RECITALS**

A. In May 1998, EPA and the Respondent entered into an Administrative Order on Consent pursuant to Sections 104, 106(a), 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622 (the "1998 AOC").

B. EPA and Respondent by and through this Modification of the 1998 Administrative Order on Consent ("this AOC") desire to (i) terminate Respondent's obligations under the 1998 AOC except for those specifically referenced herein; (ii) resolve and settle any and all claims EPA has or may assert for stipulated penalties under the 1998 AOC; (iii) resolve and settle any and all claims EPA has or may assert for oversight response costs under the 1998 AOC; and (iv) establish a mechanism under which Respondent shall carry out a Riparian Conservation Project, as described below in Section III, near the former Leviathan Mine site.

## **II. STIPULATIONS AND FINDINGS**

Respondent stipulates and EPA finds as follows:

1. In the 1998 AOC, Respondent agreed to perform specified work, including the removal of liquids collected in the evaporation ponds at the Leviathan Mine Site ("the Site") so that by no later than November 1, 1998 those ponds would provide 8.5 million gallons of freeboard capacity. The 1998 AOC included provisions for stipulated penalties in the event that Respondent failed to fully comply with its terms. Section X (1)(d) of the 1998 AOC provided that Respondent would be liable for stipulated penalties for the failure to create freeboard capacity of 8.5 million gallons in the evaporation ponds.

2. Pursuant to the requirements of Section V of the 1998 AOC, paragraph 2.b, ARCO submitted a Work Plan describing additional data collection activities at the Site. ARCO has completed said data collection activities during 1998 and 1999, and provided all collected data to EPA. With receipt of all collected data, EPA finds that all other obligations arising under Section V of the 1998 AOC have been satisfactorily complied with.

3. EPA and Respondent hereby agree to modify the 1998 AOC so as to terminate Respondent's obligations under the 1998 AOC except as specifically referenced herein, and to require that Respondent complete the Riparian Conservation Project ("RCP") as set forth in Section III below.

## **III. ORDER**

4. Based on the foregoing Stipulations and Findings and the Administrative Record for this Site, it is hereby ordered and agreed that Respondent shall comply with the following provisions,

including but not limited to all attachments to this Order, and all documents incorporated by reference into this Order, and perform the following set forth herein.

5. The provisions of this AOC shall apply to and be binding upon Respondent, its agents, servants, employees, successors and assigns.

6. Respondent agrees to perform a Riparian Conservation Project ("RCP") as follows:

7. As a RCP, which the parties agree is intended to secure significant environmental protection and improvements, Respondent shall, within seven business days after the effective date of this AOC, place a principal amount of \$700,000 in a separate interest bearing account with a commercial banking institution. Interest on this principal shall begin to accrue on the effective date of this AOC, at the rate specified in CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4), or the rate actually earned by the investment of this principal, whichever is greater. The principal plus the interest described in the previous sentence shall be used solely for the purchase or acquisition of an interest, or some portion of an interest, in riparian property located in the eastern slope of the Sierra Nevada in California or Nevada, within 50 miles of the Site, as well as the restoration and preservation of that property, to be held in perpetuity as a riparian lands preservation parcel. The property must include or border on a stream capable of supporting a self-sustaining trout population. Additional adjacent property beneficial to maintaining water quality, flow volume and stream or riparian habitat may be included in the RCP. Respondent may charge its direct costs for implementation of the RCP against the principal and interest, including commissions, broker fees, survey costs and fees, but not including attorney's fees.

8. Respondent shall develop and implement the RCP according to the following schedule:

a. Immediately after the effective date of this AOC, Respondent will consult with the Washoe Tribe of Nevada and California ("the Tribe") regarding the RCP.

b. Within 180 days from the effective date of this AOC, Respondent shall submit to EPA a proposal for the location of the RCP property, the restoration, if any, and conservation of the property, and the legal mechanism for protecting that property ("the RCP Proposal"). This submission must be made with the concurrence of the Tribe. EPA may accept, reject, or modify any portion of the RCP Proposal. If EPA requires revisions, Respondent shall submit a revised RCP Proposal within 60 days of receipt of EPA's notification of the required revisions.

c. Within 120 days of receipt of notification of EPA's approval of the first-submitted RCP Proposal or the revised RCP Proposal, Respondent shall provide EPA documentation showing that a property interest approved by EPA is subject to a purchase agreement.

d. Within 180 days of receipt of notification of EPA's approval of the first-submitted RCP Proposal or the revised RCP Proposal, Respondent shall provide EPA documentation showing that the property interest approved by EPA has been purchased and ownership or title transferred to the party identified in the RCP Proposal approved by EPA as the party to hold that interest.

e. Respondent may request and EPA shall grant a reasonable extension of any deadline set forth in this paragraph 8 if EPA finds good cause shown.

9. If any of the deadlines in the preceding paragraph are not met, or if EPA rejects the RCP Proposal, EPA may direct Respondent to work with another entity, other than the Tribe, that is a not-for-profit organization with experience in the purchase of property interests for conservation

purposes ("Trustee"). EPA will provide such notice to Respondent and the Trustee in writing. Following such notice, Respondent shall develop and implement an Alternative RCP according to the following schedule:

a. Within 180 days from the date of such notice, Respondent shall submit to EPA an Alternative RCP Proposal for the location of the RCP property, the restoration, if any, and conservation of the property, and the legal mechanism for protecting that property. This submission must be made with the concurrence of the Trustee. EPA may accept, reject, or modify any portion of the Alternative RCP Proposal. If EPA requires revisions, Respondent shall submit a revised alternative RCP Proposal within 60 days of receipt of EPA's notification of the required revisions.

b. Within 120 days of receipt of notification of EPA's approval of the first-submitted Alternative RCP Proposal or the revised Alternative RCP Proposal, Respondent shall provide EPA documentation showing that a property interest approved by EPA is subject to a purchase agreement.

c. Within 180 days of receipt of notification of EPA's approval of the first-submitted Alternative RCP Proposal or the revised Alternative RCP Proposal, Respondent shall provide EPA documentation showing that the property interest approved by EPA has been purchased and ownership or title transferred to the party identified in the RCP Proposal approved by EPA as the party to hold that interest.

d. Respondent may request and EPA shall grant a reasonable extension of any deadline set forth in this paragraph 9 if EPA finds good cause shown.

10. With respect to the RCP, Respondent shall:

a. Submit to EPA copies of any documentation regarding the transmittal of funds or the transfer of a property interest for the RCP to the Tribe or other Trustee within 30 days following such transmittal or transfer.

b. Require by written agreement that the Tribe or other Trustee, upon the receipt of funds or transfer of a property interest, provide Respondent with confirmation of said transfer of property interest for RCP property, together with a copy of all legal instruments documenting the transfer, such as deeds.

c. Submit all submittals pursuant to this Section to:

U.S. Environmental Protection Agency  
Kevin Mayer  
75 Hawthorne Street  
San Francisco, California 94105-3901

d. All Notices to Respondent under this AOC shall be made to:

ARCO Environmental Remediation L.L.C.  
Neal S. Brody, Esq.  
444 South Flower Street, 35th Floor  
Los Angeles, CA 90071

and to

Sandra M. Stash  
ARCO Environmental Remediation, L.L.C.  
307 E. Park Street  
Anaconda, Montana 59711

e. All Notices to the Tribe under this AOC shall be made to:

Tim Seward  
General Counsel  
Washoe Tribe of Nevada and California  
919 U.S. Highway 395 South  
Gardnerville, Nevada 89410

f. EPA and Respondent may change the person designated for receipt of submittals or notices by notifying the other party 5 days before such a change is made. The initial notification may be made orally, but it shall be promptly followed by a written notice.

11. Respondent hereby certifies that, as of the date of this AOC, Respondent is not required to perform or develop the RCP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the RCP by agreement, grant or as injunctive relief in this or any other case or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive credit in any other enforcement action for the RCP.

12. Whether Respondent has complied with the terms of this AOC through completion of the RCP as herein required shall be the sole determination of EPA; however, any EPA determination made pursuant to this AOC may be disputed by Respondent under the dispute resolution procedures set forth in Section VIII of the 1998 AOC.

13. In the event that Respondent fails to comply with any of the terms or provisions of this AOC relating to the performance of the RCP described above and/or to the extent that the actual expenditures for the RCP do not equal or exceed the cost of the RCP described above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

a. Except as provided below, for a RCP which has not been completed to the satisfaction of EPA pursuant to this AOC and Order, Respondent shall pay a stipulated penalty to the United States in an amount up to \$ 1,000,000, to be determined by EPA.

b. Except as provided in subparagraph (d) below, if the RCP is not completed to the satisfaction of EPA, but the Respondent has placed the required funds in an interest bearing

reserve account and made good faith and timely efforts to comply with all requirements of the RCP, Respondent shall not be liable for any stipulated penalty.

c. The determination of whether the RCP has been satisfactorily completed, whether the Respondent has placed the required funds in a separate interest bearing account, and whether the Respondent has made a good faith, timely effort to comply with all other requirements of the RCP shall be in the sole discretion of EPA.

d. For failure to submit reports required pursuant to the RCP, as provided in paragraph 8, above, Respondent shall pay a stipulated penalty in the amount of up to \$1,000 for each day after the report was originally due until the report is submitted.

e. Stipulated penalties for subparagraph (d) above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

f. Respondent shall pay stipulated penalties within fifteen (15) days of receipt of written demand by EPA for such penalties, unless Respondent disputes EPA's determination as provided in Paragraph 12 above.

14. Any public statement, oral or written, made by Respondent making reference to the RCP shall include the following language: "This project was undertaken in connection with the settlement of a dispute with the U.S. Environmental Protection Agency."

15. Failure by Respondent to comply with the terms of this AOC may subject Respondent to further enforcement action. Failure to pay any assessed stipulated penalty in full in compliance with the terms of this AOC may subject Respondent to a civil action to collect the assessed penalty, plus interest, attorneys' fees, and costs for collection proceedings. In any such



collection action, the validity, amount and appropriateness of the penalty shall not be subject to review.

16. Interest shall accrue on any amounts overdue under the terms of this AOC at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. A late payment handling charge of \$20.00 will be imposed after thirty (30) days, with an additional charge of \$10.00 for each subsequent 30-day period during which an unpaid balance remains.

#### **IV. REIMBURSEMENT OF COSTS**

17. Within 30 days of receipt of EPA's bill for response costs incurred in connection with the 1998 AOC between March 1, 1998 and the effective date of this AOC, Respondent shall pay such costs in accordance with the procedures for payment set forth in Section VII of the 1998 AOC. Upon receipt of Respondent's payment, Respondent's obligations under the 1998 AOC shall be satisfied, and all further obligations upon Respondent arising under the 1998 AOC shall terminate.

#### **V. RESERVATION OF RIGHTS**

18. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law. Nothing in this agreement should be construed to effect any natural resource damage claim of the United States, the Washoe Tribe of Nevada and California, or any State.

19. This AOC shall not constitute an admission of fact or liability for any purpose, and Respondent does not waive and reserves all rights, arguments and defenses under the 1998 AOC or otherwise relating to the Site.

## VI. EFFECTIVE DATE

20. The undersigned representative of ARCO and EPA certifies that he/she is fully authorized to enter into the terms and conditions of this AOC and to bind the party he/she represents to this AOC.

21. This AOC shall be effective on the day a copy executed by EPA is received by Respondent.

Agreed this 15 day of February, 2000.

BY: 

Sandra M. Stash

Vice President, Environmental Site Management  
ARCO Environmental Remediation, L.L.C.

It is so ORDERED and Agreed this 18<sup>th</sup> day of February, 2000.

BY: 

Keith Takata

For Director, Superfund Division

Region IX

U.S. Environmental Protection Agency